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Exhibit E

OPTIMAL
INVESTMENT SERVICES

July 2006
Jonathan Clark
+1 212 350 3500
ois@schny.com

Madoff Securities

S&P 100 Equity Options Arbitrage

Lead manager:	Bernard Madoff	**Firm assets:**	Estimated at $15 billion
Address:	885 Third Avenue, New York, NY 10022	**Open/closed:**	Selectively open
Tel:	(212) 230-2424	**Headcount:**	320
Fax:	(212) 838-4061	**Firm incpn:**	1960

Summary

The following report collects work done over the last two years researching Madoff Securities and its counterparties on organizational aspects. Madoff Securities currently manages $2.2 billion for Optimal SUS. Madoff Securities' setup for trading client assets is different than that of a regular hedge fund and thus poses several questions which we address in this report. In the following sections we identify and review various aspects of organizational risk and propose risk monitoring steps to address them.

Summary areas of potential risk:

- Privately owned family business shrouded in secrecy
- Counterparty risk in the options trading
- No independent custody of client assets (Madoff is the custodian)
- Lack of transparency into client accounts, through either clearing or banking accounts (although this is standard brokerage firm procedure)
- No independent verification of trading activity (unlike a standard hedge fund that has a primer broker)
- Not regulated as an investment advisor
- Lack of realistically independent auditor – Friehling & Horowitz is a very small firm with Madoff as its only major client

Mitigants to the above risks:

- Fully SEC, NASD, and FSA registered, controlled, and reviewed as a broker-dealer
- Strong financial standing with over $550 million in equity supporting a $900 million balance sheet
- Trade clearing through the DTC provides third party verification at an aggregate level, though not at the segregated level nor transparent to the ultimate client (Optimal SUS)
- Independent audit firms have reviewed positively (HSBC, PWC)
- Transparency of trading activity on timely basis (T+2)
- Madoff participation and visibility in dealer and regulator activity (board memberships, committee participations)

In addition to this Investment team report, the Operational due diligence team is in the process of performing a review of Madoff Securities as part of their ongoing coverage.

Organization	**Organization observations:** Madoff Securities is a privately owned family business which enhances control, but on the other hand, also increases the possibility of collusion. **View:** Despite the above, we believe the organization is efficiently and professionally managed. **Risk monitoring steps:** We review the risk of irregularities under Regulation below. Madoff Securities is a leading international market maker in all of the S&P 500 stocks, over 200 NASDAQ issues, bonds, and other securities. The firm has been providing services to broker-dealers, banks, and financial institutions (with some 600 major brokerage clients currently) since 1960 and is a leader in the U.S. "third market," which trades US listed equities away from the exchange floor. The firm is led by founder Bernie Madoff and his brother Peter Madoff, who is the senior managing director and head of trading. Madoff Securities is a registered U.S. broker-dealer regulated by the SEC and the NASD. Madoff Securities International is regulated by the FSA and is a member of the London Stock Exchange and NASDAQ Europe. Madoff Securities is not registered as an investment advisor. We explain in greater detail these aspects under Regulation below. The business is divided into the broker-dealer business and the **client managed accounts**. The broker-dealer business consists of two components, **prop trading** and **market making**, which are each headed by one of Bernie's two sons, who started at the firm after college and are currently 38 and 40. Six managers report to them, each of whom has been at the firm for at least 25 years. Volumes in the broker-dealer business remain steady at 250 thousand transactions per day (according to Madoff, this information is not available from the SEC or DTC). Bernie Madoff personally maintains tight **controls** at the firm; he has told us that "it's my money" and so he checks balances on a daily basis himself. The firm's controls include formal monitoring of all communications (mail, fax, email). Outgoing email and instant messaging are not available for traders. In addition to these precautions, the firm owns a fidelity bond underwritten by Chubb which reimburses the firm in the case of internal fraud. Madoff has not made any claims against this policy and the firm has not suffered any cases of internal fraud. Other internal controls include the firm's internal audits, performed monthly by a seven person team, and the firm's high automation and inbuilt risk limits. For example, although the firm's Compliance department checks for best execution and allocation to client accounts, this is all systems driven in the first place. Computer systems run on Stratus hardware and are all internally developed as they have found other products to be unsatisfactory. In the past, they have used their systems expertise to participate on a consulting basis in the development of the Nasdaq exchange and numerous international exchanges.
Internal trade processing and execution	**Trade processing observations:** 1) Stock transactions are processed in standard manner, with the exception of time stamping, 2) As the options trading is done OTC it has counterparty risk.

	View: Further transparency into the stock transactions would give them more specificity and thus a better audit trail, but we understand why this is not practical and in any case a change in the format of their reporting is not an option from Madoff's perspective (we have broached the subject in the past). With regard to the options trading, considering that in a worse case scenario one is left with a basket of highly liquid stocks, we consider the level of counterparty risk taken acceptable. **Risk monitoring steps:** 1) Continue to monitor trading activity at the individual trade level for consistency with market levels, 2) Continue to attempt to independently confirm Madoff trading activity with an options counterparty. In trading activity for the managed accounts, positions are accumulated through multiple transactions with multiple counterparties over a period of days in order to minimize market impact. Stocks are initially bought into Madoff's prop trading account and then sold on a pro-rata basis to the various managed accounts at the average purchase price plus a four cent per share commission. This explains why there are no time stamps or counterparties listed on trade tickets. The trade tickets are received on average two days after the trade date and report an average execution price (from the multiple trades in each name) and are written manually with system generated information. We recently caught a reporting error in the trade tickets (see Appendix I for details), but this is a rarity which has not happened before, to our knowledge. As is consistent with the mandated Chinese Wall between market making and client accounts, Madoff does not **internalize** trades (i.e. the market making side of Madoff never serves as the counterparty for managed account transactions). Although most trading is conducted in New York, the account is traded around the clock with some of the execution carried out through Madoff's London affiliate. The **options trading** employed by the strategy is exposed to counterparty risk. Although Madoff buys options with exchange-traded terms (standardized strike price, maturity, etc), he trades them in the OTC market with major dealers. Bernie Madoff was chairman of the National Securities Clearing Corporation (and was closely involved in its formation in the 1970s) and therefore has a very clear understanding of counterparty risk. The fund diversifies risk with twelve trading counterparties, with whom 'performance assurance' contracts are in place. This diversification also serves the purpose of concealing positioning. We have not yet found a source at the major dealers with whom to confirm Madoff options trading activity (neither has Fairfield). In any case, the worst case scenario for a counterparty failure would be worthlessness of the long put positions (short options exposure does not give rise to counterparty risk), making the portfolio a long-only portfolio of highly liquid stocks.
Trade clearing and custody	**Trade clearing observations:** 1) Clearing and custody of our managed account is conducted according to industry standards, 2) Independent third party verification at the sub-account, or beneficial owner, level is not possible without Madoff's involvement. **View:** Further transparency and control of the assets has been discussed in the past, and although certainly desirable, remains a non-starter from Madoff's perspective. Our view is that since the current custody arrangement is standard industry practice for managed accounts with broker-dealers, this is acceptable. In addition to this, PWC and Fairfield's past checks provide some measure of comfort regarding this point. **Risk monitoring steps:** Continue verifying Madoff Securities' continued participation

with independent clearing firms and good standing with the regulatory authorities.

Madoff Securities is a full clearing firm and a member of all US clearing corporations and depositories. The firm's systems also interface fully with the systems of all major global custodians and clearing and settlement systems. The DTC is the primary clearinghouse for equities. Equities traded through the London affiliate are cleared through foreign agencies and treasury bills are cleared through the GSCC.

The Depository Trust & Clearing Corporation's (DTCC) subsidiaries provide the infrastructure for clearing, settlement, and custody of most US securities transactions. DTCC was created in 1999 when its subsidiary operating companies The Depository Trust Company (DTC) and the National Securities Clearing Corporation (NSCC) - both of which were founded in the 1970s -- were combined under a single holding structure. DTC is the world's largest securities depository and a clearinghouse for trading settlement; NSCC processes most broker-to-broker equity, corporate, and municipal bond trades in the US.

Client assets (ie shares) are held at the DTC in **segregated accounts** designated as Madoff Client Accounts in accordance with SEC Rule 15(c)(3)(3). Thus, although not specific to a particular client, they are not commingled with Madoff assets (since they are a cash, not a margin, account) and are not available to general creditors of the firm. A further point to note is that this segregation effectively eliminates the ability to use client assets to finance proprietary activities, such as market making. Likewise there is no separation by client in the brokerage firm's bank accounts.

We spoke with **DTC** account executive Chris Breen on May 8th. He confirmed that Madoff Securities is a "direct participant", ie one of the dealers or banks that uses its clearing services for trade settlement, but limited further comment given that Madoff is a client. The DTC is owned by a number of direct participants, members of several national securities clearing corporations, the NYSE, Amex, and NASD. In turn, direct participants clear securities for "indirect participants" of the DTC. Indirect participants are also dealers, banks, trust companies, and other clearing corporations, not customers (or "beneficial owners"). Chris also confirmed that the DTC does not have transparency or responsibility to the beneficial owners of the securities it clears on behalf of its direct participants. This is also the case for auditors, who make their information requests through the direct participants.

Therefore, we can summarize the clearing and custody status of our managed account as being according to industry standards, which does not allow for independent third party verification at the sub-account, or beneficial owner, level. Madoff is opposed to any alteration of the standard brokerage custodial arrangement (such as, for example, putting the assets in a client controlled account). He has stated that any other kind of arrangement would diminish his control over the stocks, which he considers essential given the options positions used. The manager requires custody of the stock in order to write options against it and not risk being unable to deliver stock into a call contract. Moreover the manager would face significant logistics issues with a separate custodian.

In our conversations with Fairfield's analyst Amit Wijaywergiya last year and June 28th we learned that Fairfield partner Jeffrey Tucker was given access by Madoff some ten years ago to compare trade tickets against Madoff's internal blotter (log of all transactions) and to confirm trade activity with the DTC. This check successfully confirmed internal consistency as well as with the DTC. It is highly unlikely that Madoff would agree to a background check as extensive as this again and Fairfield has not repeated the exercise. The fact that it has been done with one of the major Madoff

	accounts at some point in the past, however, does offer some level of comfort. In addition, PWC, auditor for several of Madoff's managed account clients, has conducted spot checks to ensure that pro-rata allocations across accounts are appropriate. In turn these pro-rata allocation calculations have matched DTC records for Madoff client accounts. We have reviewed PWC notes covering other operational aspects at Madoff Securities. The above points provide a measure of independent verification of Madoff's trading activity, albeit from indirect sources to us.
Regulation	**Regulation observations:** 1) Madoff Securities has a clean regulatory record going back over 45 years except for three very minor infractions, 2) Its financial standing is strong, 3) Regulation cannot guarantee there will not be improprieties, 4) The extent and nature of publicly available reports makes their review, though necessary, unlikely to uncover irregularities. **View:** Madoff Securities suffering or committing an irregularity is possible but remote. **Risk monitoring steps:** Continue to cultivate our relationship with Bernie Madoff and others in his organization to allow us to assess any potential change in motivation that would lead to improprieties. Given the importance of this account, this should continue to be pursued by the various levels within Optimal (CIO, ICM members, analyst). Our research in the regulatory area has focused on assessing Madoff Securities' compliance with regulations and its ability to sidestep the authorities' scrutiny. Madoff Securities is regulated as a broker-dealer but not as an investment advisor, which would require additional disclosure (Form ADV and its extensions) and complexity (eg fund audits). This is intentional on Madoff's part and is an integral part of how the managed account is set up (see Appendix 2). The SEC's **Division of Market Regulation** regulates broker-dealers to ensure fair dealing and best execution, among other principles. This is done by requiring certain levels of minimum capital (the Net Capital rule), the safeguarding of customer securities (Customer Balances and Customer Protection rules), and the maintenance of accurate records (Required Books, Records, and Reports rule). In addition there are Risk Assessment requirements (see Appendix 3 for more detail on each of these). These requirements are checked by SROs ("self-regulatory organizations" such as the NASD and major exchanges) on behalf of the SEC and by the SEC itself through inspections and required member filings. The NASD conducts biannual "Trading and Market Audits", which include random spot checks of client accounts for internal reporting and consistency with clearing accounts. The SEC's audits are typically every two years. Although these audit reports are not available to us, we have been told by Bernie Madoff and his auditor that both the SEC and NASD performed audits on the firm in 2005, without any actions or qualified opinions. Broker-dealers are required to periodically update their registration status in **Form BD**, where the dealer certifies its status with regards to any affiliations and arrangements with other firms, criminal activity, regulatory actions, civil judicial actions, and solvent financial standing. The firm has never been sued nor does it have any pending litigation. We recently examined NASD BD reports for the last eight years. The 1963 and 1974

	censures and fines in the amount of $500 and $25, respectively, are regulatory items disclosed in the forms. A more recent censure and fine ($7000) occurred in July, 2005 when the firm failed to immediately display customer limit orders on Nasdaq securities. At the beginning of 2001, the firm changed from a sole proprietorship to a limited liability company with no change in ownership (ie Bernard Madoff 100% owner). The reports also show partial registration withdrawals from the states of Nebraska, California, Texas, and Hawaii in 2001 (no reasons given). We also examined **financial statements** from 2000 through 2005 (part III of the Focus report, or form X-17A-5). The most recent balance sheet (October 2005) shows $918 million in assets funded by $554 million in equity. There are no other particularly noteworthy items. The above reports comprise the publicly available reports. Parts I and II of the Focus report and Risk assessment reports (form 17-H) are not made available to the public. Part I of the Focus report is monthly and deals with the financial results and condition of the broker-dealer (with line items such as Net Profit/Loss, Net Capital, and Clearing Agency Balances). Part II of the Focus report covers both operational and financial aspects in greater detail and is prepared at the same time as the firm's annual report. Some sample topics of coverage are: Segregation Requirements, Stock Breaks, and Capital Withdrawals. Part III of the Focus report, as mentioned above, are the standard annual financial statements. The Risk assessment report (form 17-H) is quarterly and details the firm's organizational chart, risk management policies, any legal proceedings, and financial statements. Sample topics of coverage are: Off-Balance Sheet Risk, Credit Risk, and Real Estate. In summary, oversight of broker-dealers is detailed and multi-layered but works through a **self-regulating system**. The system is thorough but also seems to depend more on the penalizing of infractions than on their prevention. Greater transparency into the SEC and NASD's required reports would be helpful.
Financial reporting	**Financial reporting observations:** 1) The external auditor cannot be considered realistically independent, 2) The PWC audit of the SUS fund does not provide independent verification of account activity, 3) No auditor's work can ensure 100% integrity of the information. **View:** Despite Friehling & Horowitz's dependence on Madoff Securities, F&H in fact is a dedicated firm that likely conducts quality work. However, it remains vulnerable to influence by Madoff Securities. Regarding Optimal SUS's audit, we have considered the possibility of PWC conducting deeper audits, but believe that these would not in fact be that useful. **Risk monitoring steps:** Continue to seek separate and independent sources of information on Madoff Securities' financial standing. **Madoff Audit** Friehling & Horowitz (F&H) of New City, NY is Madoff Securities' **external auditor.** We spoke with David Friehling on November 18th, 2005 and on July 11th at Madoff's offices as Bernie Madoff requested the meeting include him. This is a small firm of three to four professionals with two hundred clients consisting of primarily small businesses – Madoff is its only large account. Friehling mentioned Comad as being a broker-dealer client in addition to Madoff Securities; we have not been able to find information on this company. Madoff became a client 21 years ago as one of the

	Friehling partners had worked for Bernie previously (we note that Madoff Securities dates to 1960, so there would be a prior auditor to Friehling). Friehling is a father / son - in-law partnership. David describes the annual audit at Madoff as compliance focused and taking 250 hours in a year-long process. Assets, liabilities, and income are 100% verified and expenses are sampled, per US GAAP audit standards. F&H's work includes the managed accounts, but as auditors they are not aware of any distinctions between types of client accounts. The audit includes verifying balances with the DTC and other brokers and checking internal statements against customer statements. F&H has not worked with PWC on any audit work. When we spoke in November, David seemed surprised to hear Madoff Securities described as a secretive organization – he seemed unaware of that reputation and does not encounter any hurdles in his work there. They have never issued a qualified opinion nor seen Madoff suffer any sanctions from any of the regulators, except for the three minor censures in 1963, 1974, and earlier in 2005. We examined F&H's last five audits of Madoff as mentioned earlier. **Optimal SUS Audit** We verified in 2004 in conversations with Mark Hourigan and Ken Owens of PWC Dublin that PWC's audit for Optimal SUS relies entirely on Madoff produced documentation. PWC compares Madoff's monthly client statement with the administrator's (HSBC) statement. This means that nothing is really independently verified as both are sourced from the same place. As noted earlier, however, PWC does conduct more involved on site checks with internal audit for other Madoff clients (such as Fairfield), although these do not seem to have yielded much additional information.
Appendix 1: May 2006 reporting error	Madoff's trade tickets for the May 595 Puts traded May 17th were mistakenly stamped with trade date May 19th (settlement May 22nd). This was easy to see as the activity was faxed to me yesterday (May 18th) and the trade price of $9 does not match the most recent range of prices. A call to Madoff cleared the confusion (and the price does fit with trading activity on the 17th). Trade tickets are written manually with information generated by their systems - so it was basically a typo although the systems are correct. They have also recently changed to three day settlement for options from one day before, which led to some confusion. Frank was pleased that we saw it - says we're the only ones from seven clients he faxes to that called him on it.
Appendix 2: Investment advisor triggers	Madoff Securities avoids regulation as an investment advisor for the following reasons under the Investment Advisors Act of 1940: Exemption under section 202(a)(11)(C): 1. The Trading Authorization Directive signed by Optimal and other managed account clients strictly limits the scope of Madoff's investments. Because the agreement clearly defines specific parameters governing securities eligible for purchase/sale and the brokerage relationship is not part of a larger financial planning service, Madoff's "investment advice" is considered "solely incidental". 2. The lack of a management fee for the managed accounts avoids "special compensation" for the investment advisory activities. Any compensation that is clearly defined as a charge for advice would be considered "special compensation". This excludes brokerage commissions.

	Exemption under section 203(b)(3): 1. The firm's limiting to fifteen its advisory relationships would also exempt it from registration requirements.
Appendix 3: SEC rules for broker-dealers	**Examinations and Inspections (Rules 15b2-2 and 17d-1)** Broker-dealers are subject to examination by the SEC and the SROs. The appropriate SRO generally inspects newly-registered broker-dealers for compliance with applicable financial responsibility rules within six months of registration, and for compliance with all other regulatory requirements within twelve months of registration. A broker-dealer must permit the SEC to inspect its books and records at any reasonable time. **Net Capital Rule (Rule 15c3-1)** The purpose of this rule is to require a broker-dealer to have at all times enough liquid assets to promptly satisfy the claims of customers if the broker-dealer goes out of business. Under this rule, broker-dealers must maintain minimum net capital levels based upon the type of securities activities they conduct and based on certain financial ratios. For example, broker-dealers that clear and carry customer accounts generally must maintain net capital equal to the greater of $250,000 or two percent of aggregate debit items. Broker-dealers that do not clear and carry customer accounts can operate with lower levels of net capital. **Use of Customer Balances (Rule 15c3-2)** Broker-dealers that use customers' free credit balances in their business must establish procedures to provide specified information to those customers, including: • the amount due to those customers; • the fact that such funds are not segregated and may be used by the broker-dealer in its business; and • the fact that such funds are payable on demand of the customer. **Customer Protection Rule (Rule 15c3-3)** This rule protects customer funds and securities held by broker-dealers. Under the rule, a broker-dealer must have possession or control of all fully-paid or excess margin securities held for the account of customers, and determine daily that it is in compliance with this requirement. The broker-dealer must also make periodic computations to determine how much money it is holding that is either customer money or obtained from the use of customer securities. If this amount exceeds the amount that it is owed by customers or by other broker-dealers relating to customer transactions, the broker-dealer must deposit the excess into a special reserve bank account for the exclusive benefit of customers. This rule thus prevents a broker-dealer from using customer funds to finance its business. **Required Books, Records and Reports (Rules 17a-3, 17a-4, 17a-5, 17a-11)** Broker-dealers must make and keep current books and records detailing, among other things, securities transactions, money balances, and securities positions. They also must keep records for required periods and furnish copies of those records to the SEC on request. These records include e-mail. Broker-dealers also must file with the SEC periodic reports, including quarterly and annual financial statements. The annual statements generally must be certified by an independent public accountant. In addition, broker-dealers must notify the SEC and the appropriate SRO15 regarding net capital, recordkeeping, and other operational problems, and in some cases file reports regarding those problems, within certain time periods. This gives us and the SROs early warning

	of these problems. **Risk Assessment Requirements (Rules 17h-1T and 17h-2T)** Certain broker-dealers must maintain and preserve certain information regarding those affiliates, subsidiaries and holding companies whose business activities are reasonably likely to have a material impact on their own financial and operating condition (including the broker-dealer's net capital, liquidity, or ability to conduct or finance operations). Broker-dealers must also file a quarterly summary of this information. This information is designed to permit the SEC to assess the impact these entities may have on the broker-dealer. Source: SEC (http://www.sec.gov/divisions/marketreg/bdguide.htm#V)

Exhibit F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE OPTIMAL U.S. LITIGATION	:	OPINION AND ORDER
	:	10 Civ. 4095 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION[1]

This putative class action arises out of plaintiffs' investment in the Optimal Strategic U.S. Equity Fund ("Optimal U.S." or the "Fund"), which in turn invested one-hundred percent of its assets with Bernard L. Madoff and his firm, Bernard L. Madoff Investment Securities LLC ("BMIS"). Plaintiffs allege that defendants failed to conduct adequate diligence regarding Madoff, ignored "red flags" that should have alerted them to Madoff's fraud, and made misstatements and omissions in connection with the sale of Optimal U.S. shares, causing plaintiffs to lose their investments and allowing defendants wrongfully to collect management fees.[2]

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[1] Familiarity with prior Opinions, in particular the prior Opinion on forum non conveniens, is assumed. *See In re Optimal U.S. Litig.*, 837 F. Supp. 2d 244 (S.D.N.Y. 2011) ("December 20 Opinion").

[2] Defendants include (1) Optimal U.S.'s investment manager, Optimal Investment Management Services, S.A. ("OIS"); (2) an employee thereof, Jonathan Clark; and (3) OIS's corporate parent, Banco Santander, S.A. ("Banco Santander"). Plaintiffs include (1) Pioneer International Ltd. ("Pioneer"), an investment

On December 20, 2011, I denied defendants' initial motion for forum non conveniens. At that time, the balance of factors was extremely close, and I noted that the public interest factors did point slightly in favor of dismissal. However, I denied defendants' motion based primarily on the deference owed to plaintiffs' choice of forum, the United States' interest in enforcing violations of federal securities law, and the due diligence efforts conducted in New York. Defendants now move, for a second time, for dismissal on the grounds of forum non conveniens. Since the December 20 Opinion plaintiffs' federal securities law claims have been dismissed and the parties have undertaken extensive discovery efforts in Europe. This dispute now concerns claims, governed by foreign law under relevant choice-of-law principles, brought by foreign plaintiffs suing mostly foreign defendants based on alleged misstatements made abroad. Because the balance of factors has changed and now point strongly towards dismissal,

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advisory firm incorporated in the British Virgin Islands; (2) the "Pioneer Plaintiffs," fifty-six non-U.S. persons and entities who invested in Optimal U.S. based on advice provided by Pioneer (whose advice was in turn based on Defendants' misrepresentations); (3) the "Santander Plaintiffs," three foreign citizens/non-U.S. residents to whom Banco Santander International ("Santander U.S.") marketed and sold Optimal U.S., and who held their Optimal U.S. investments in accounts with non-party Santander Bank & Trust, Ltd. in the Bahamas ("SBT Bahamas" or "SBT"); and (4) Silvana Worldwide Corp. ("Silvana"), a Plaintiff who invested in Optimal U.S. from a non-Santander-affiliated bank account. *See In re Optimal U.S. Litig.*, 813 F. Supp. 2d 351, 356-57 (S.D.N.Y. 2011) ("May 2 Opinion"); Fourth Amended Complaint ("FAC") ¶ 64.

defendants' motion is now granted.

II. APPLICABLE LAW

A. Forum Non Conveniens

"[F]ederal courts have the power to dismiss damages actions under the common-law forum non conveniens doctrine . . . in 'cases where the alternative forum is abroad.'"[3] The "decision to dismiss by reason of forum non conveniens is confided to the sound discretion of the district court."[4] "'[I]n the determination of a motion to dismiss for forum non conveniens, the court may consider affidavits submitted by the moving and opposing parties.'"[5]

The Second Circuit employs a three-part test established in the seminal case of *Iragorri v. United Technologies Corporation* in addressing

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[3] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996) (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994)). *Accord Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp*., 549 U.S. 422, 430 (2007).

[4] *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)). *Accord ICC Indus. Inc. v. Israel Disc. Bank, Ltd.*, 170 Fed. App'x 766, 767 (2d Cir. 2006) ("'Where the district court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.'") (quoting *Carey v. Bayerische Hypo-Und Vereinsbank*, 370 F.3d 234, 237 (2d Cir. 2004)).

[5] *Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 699 n.13 (S.D.N.Y. 2003) (quoting *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 645 (2d Cir. 1956)), *aff'd*, 98 Fed. App'x 47 (2d Cir. 2004).

motions to dismiss under the doctrine of forum non conveniens.[6] "At step one, a court determines the degree of deference properly accorded the plaintiff's choice of forum. At step two, it considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum."[7]

"[A] court reviewing a motion to dismiss for forum non conveniens should begin with the assumption that the plaintiff's choice of forum will stand."[8] However, "the degree of deference given to a plaintiff's forum choice varies with the circumstances" and "the choice of a United States forum by a foreign plaintiff is entitled to less deference."[9] In assessing the proper measure of deference,

> [f]actors disfavoring forum non conveniens dismissal "include the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons

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[6] *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 70-75 (2d Cir. 2001) (en banc).

[7] *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005). *Accord Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009).

[8] *Iragorri*, 274 F.3d at 71. *Accord Giro, Inc. v. Malaysian Airline Sys. Berhad*, No. 10 Civ. 5550, 2011 WL 2183171, at *5 (S.D.N.Y. June 3, 2011).

[9] *Iragorri*, 274 F.3d at 71. *Accord Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic*, No. 10 Civ. 5256, 2011 WL 3516154, at *9 (S.D.N.Y. Aug. 3, 2011).

> relating to convenience or expense." In contrast, Plaintiffs' choice of forum deserves *minimal deference* where that choice was motivated by "attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum."[10]

Thus, "the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be . . . to gain dismissal" whereas "the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons . . . the less deference the plaintiff's choice commands."[11]

At step two, "the court must consider whether an adequate alternative forum exists."[12] "The defendant bears the burden of establishing that a presently available and adequate alternative forum exists."[13]

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[10] *Erausquin v. Notz, Stucki Mgmt. (Bermuda) Ltd.*, 806 F. Supp. 2d 712, 724-25 (S.D.N.Y. 2011) (quoting *Iragorri*, 274 F.3d at 72) (emphasis added).

[11] *Palacios v. Coca-Cola Co.*, 757 F. Supp. 2d 347, 352 (S.D.N.Y. 2010) (quotation marks omitted). *Accord Huang v. Advanced Battery Tech., Inc.*, No. 09 Civ. 8297, 2010 WL 2143669, at *3 (S.D.N.Y. May 26, 2010).

[12] *Iragorri*, 274 F.3d at 73.

[13] *Abdullahi*, 562 F.3d at 189.

> Dismissal is not appropriate if an adequate and presently available alternative forum does not exist. . . . [A] forum may . . . be inadequate if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all.[14]

However, "[a]n alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute."[15] "An agreement by the defendant to submit to the jurisdiction of the foreign forum can generally satisfy this requirement, and only on rare occasions will the alternative forum . . . be so unsatisfactory that the forum is inadequate."[16] Moreover, "[t]he availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum, nor on identical remedies."[17]

"At step three, Defendants must establish that a balancing of the

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[14] *Id.*

[15] *Pollux Holding*, 329 F.3d at 75. *Accord Turedi v. Coca-Cola Co.*, 343 Fed. App'x 623, 625 (2d Cir. 2009); *Online Payment Solutions Inc. v. Svenska Handelsbanken AB*, 638 F. Supp. 2d 375, 384 (S.D.N.Y. 2009) ("[T]he standard imposed on a defendant to establish such adequacy is not heavy.").

[16] *BFI Grp. Divino Corp. v. JSC Russian Aluminum*, 298 Fed. App'x 87, 91 (2d Cir. 2008) (quotation marks omitted).

[17] *Norex Petroleum*, 416 F.3d at 158 (quotation marks omitted). *Accord PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998).

private and public interest factors tilts heavily in favor of the alternative forum."[18] In weighing the private and public interests, the Second Circuit employs a list of factors first stated in *Gulf Oil Corp. v. Gilbert.*[19] "The private interest factors include: (1) the relative ease of access to evidence; (2) the cost to transport witnesses to trial; (3) the availability of compulsory process for unwilling witnesses; and (4) other factors that make the trial more expeditious or less expensive."[20] "In considering these factors, the court is necessarily engaged in a comparison between the hardships defendant would suffer through the retention of jurisdiction and the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country."[21] However, "the concentration of evidence [overseas] weighs heavily in favor of dismissal."[22] Moreover, American courts may not be able to "compel unwilling third-party

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[18] *Erausquin*, 806 F. Supp. 2d at 726.

[19] *See Iragorri*, 274 F.3d at 73-74 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), *superseded by statute as stated by Gazis v. John S. Latsis (USA) Inc.*, 729 F. Supp. 979, 987 (S.D.N.Y. 1990)).

[20] *Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 453-54 (S.D.N.Y. 2008).

[21] *Iragorri*, 274 F.3d at 74.

[22] *Palacios*, 757 F. Supp. 2d at 361.

witnesses to appear in the United States."[23]

"The public interest factors include: (1) settling local disputes in a local forum; (2) avoiding the difficulties of applying foreign law; and (3) avoiding the burden on jurors by having them decide cases that have no impact on their community."[24] No one factor is dispositive, however, and so, for example, although "this country's interest in having United States courts enforce United States securities laws" is relevant "this interest is not outcome-determinative."[25] In sum, "[t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable."[26]

B. Choice of Law

To resolve choice-of-law conflicts in tort cases, New York applies an "interest analysis" to identify the jurisdiction that has the greatest interest in the litigation based on the occurrences within each jurisdiction, or contacts of the parties with each jurisdiction, that "'relate to the purpose of the particular law in

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[23] *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 30 (2d Cir. 2002).

[24] *Maersk*, 554 F. Supp. 2d at 453-54.

[25] *DiRienzo*, 294 F.3d at 28. *Accord Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993) ("United States courts have an interest in enforcing United States securities laws, [but] this alone does not prohibit them from dismissing a securities action on the ground of forum non conveniens.").

[26] *Iragorri*, 274 F.3d at 74-75.

conflict.'"[27]

> Under the interest-analysis test, torts are divided into two types, those involving the appropriate standards of conduct, rules of the road, for example and those that relate to allocating losses that result from admittedly tortious conduct . . . such as those limiting damages in wrongful death actions, vicarious liability rules, or immunities from suit.[28]

"Conduct-regulating rules have the prophylactic effect of governing conduct to prevent injuries from occurring."[29] When such rules are at issue, the law of the place of the tort — commonly known as *lex loci delicti* — "will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders."[30] In the end, "[i]f the choice of law analysis leads to the application of foreign law, a court may refuse to apply that law only if its application would be violative of fundamental notions of justice or prevailing

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[27] *GlobalNet Financial.com v. Frank Crystal & Co.*, 449 F.3d 377, 384 (2d Cir. 2006) (quoting *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 197 (1985)). *Accord Finance One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 337 (2d Cir. 2005) (citation omitted) (explaining that the interest analysis is a "flexible approach intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation").

[28] *GlobalNet Financial.com*, 449 F.3d at 384 (quotation marks and citations omitted).

[29] *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 522 (1994).

[30] *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993).

concepts of good morals."[31]

III. DISCUSSION

A. Deference Accorded to Plaintiffs' Choice of Forum

Generally, a foreign plaintiff's choice of forum is accorded less deference, unless the choice of forum is based on "valid reasons, such as convenience."[32] In the December 20 Opinion on forum non conveniens, I held that plaintiffs' choice of forum was accorded deference.[33] In doing so, I distinguished four opinions holding that plaintiffs' choice of forum was not accorded significant deference in similar cases involving foreign investors in foreign funds that allegedly suffered losses due to the Madoff Ponzi scheme.[34] In reevaluating the *Iragorri* factors, I now conclude that plaintiffs' choice of forum is "entitled to

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[31] *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998) (citing *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1031 (2d Cir. 1996)).

[32] *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 177 (S.D.N.Y. 2006).

[33] *See Optimal*, 837 F. Supp. 2d at 253-56.

[34] *See In re Herald, Primeo, & Thema Sec. Litig.*, No. 09 Civ. 289, 2011 WL 5928952 (S.D.N.Y. Nov. 29, 2011); *Erausquin v. Notz, Stucki Mgmt. (Bermuda) Ltd.*, 806 F. Supp. 2d 712 (S.D.N.Y. 2011); *Anwar v. Fairfield Greenwich Ltd.*, 742 F. Supp. 2d 367, 375-78 (S.D.N.Y. 2010) ; *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1336 (S.D. Fla. 2010), *aff'd sub nom. Inversiones Mar Octava Limitada v. Banco Santander S.A.*, No. 10-14012, 2011 WL 3823284 (11th Cir. Aug. 30, 2011) (per curiam).

some, but little, deference."[35]

First, the "convenience of the plaintiff's residence in relation to the chosen forum,"[36] was not a significant factor in my prior analysis. As I previously noted, "plaintiffs reside all over the world" and "[t]here simply is no forum that is convenient in relation to *all* plaintiffs' residences."[37] Accordingly, "[w]hile [this factor] do[es] not suggest that New York is preferable to Switzerland . . ., [it] do[es] not raise any inference that plaintiffs' choice of New York was motivated by forum shopping considerations."[38]

Second, "the availability of witnesses or evidence to the forum district"[39] now weighs against according significant deference to plaintiffs' choice of forum. I previously noted that there was a significant amount of evidence in New York as well as in Europe, and held that this factor did not weigh heavily in either direction.[40] However, as discovery in this case has progressed, it has become clear that the focus of discovery is in Europe, which weighs against according

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35 *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d at 1336.

36 *Iragorri*, 274 F.3d at 72.

37 *Optimal*, 837 F. Supp. 2d at 253 (emphasis in original).

38 *Id.* at 254.

39 *Iragorri*, 274 F.3d at 72.

40 *See Optimal*, 837 F. Supp. 2d at 254.

plaintiffs' choice of forum deference. As of July 16, plaintiffs had noticed or taken two depositions in New York, while fourteen deposition had been noticed or taken in Europe.[41] Moreover, plaintiffs have resisted sitting for depositions in New York arguing that it would "requir[e] disruptive and expensive international travel for each Plaintiff."[42] Finally, the document discovery has been focused abroad – fourteen letters rogatory have been issued seeking discovery in the United Kingdom, Ireland, Spain, Switzerland, Netherlands, and Israel.[43] Plaintiffs have submitted declarations detailing the scope of relevant evidence located in the United States.[44] However, these declarations mainly detail the documentary evidence relating to diligence efforts in the United States, which does not change my analysis that the significance of the United States evidence is outweighed by that located in Europe.

Although plaintiffs suggest that there is a possibility of deposing several additional U.S. residents,[45] the focus of their discovery has been in Europe.

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[41] *See* 7/16/12 letter from Paulo R. Lima, defendants' counsel, to the Court.

[42] 7/13/12 letter from Javier Bleichmar, plaintiffs' counsel, to the Court.

[43] *See* 7/16/12 letter at 3.

[44] *See* 8/6/12 and 8/8/12 Declarations of Javier Bleichmar, plaintiffs' counsel.

[45] *See* 8/6/12 Declaration of Javier Bleichmar, plaintiffs' counsel, ¶ 6.

As discussed below, several key witnesses are former employees of OIS and not subject to compulsory service to attend a trial in New York. Accordingly, while in my prior opinion I noted that letters rogatory are an appropriate mechanism for securing testimony and that technological advances make international document production less burdensome,[46] it is now clear that the location abroad of the vast bulk of the evidence weighs against according significant deference to plaintiffs' choice of forum.

Third, "the defendant's amenability to suit in the forum district,"[47] as discussed previously, still weighs in favor of according some deference to plaintiffs' choice of forum despite defendants' consent to jurisdiction in Switzerland.[48] However, I do not weigh this factor heavily because no plaintiff is a U.S. citizen and only one defendant is a U.S. citizen.

Fourth, I previously found that there was no indication that plaintiffs' choice of forum was motivated by improper tactical considerations.[49] Given that the focus of discovery has not been the United States, I am less inclined to infer

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[46] *See Optimal*, 837 F. Supp. 2d at 254.

[47] *Iragorri*, 274 F.3d at 72.

[48] *See Optimal*, 837 F. Supp. 2d at 254-55.

[49] *See id.* at 255.

that plaintiffs' choice of forum was motivated by genuine convenience rather than tactical considerations. Indeed, in a prior action based on similar facts brought by many of the same plaintiffs' counsel, the court noted that plaintiffs "acknowledge[d] that their decision to sue in the United States [was], to a considerable extent, based on the availability of advantageous procedural mechanisms such as the class action and contingency fee arrangements."[50] Accordingly, I find that this factor does not favor deference to plaintiffs' choice of forum.

Fifth, I previously concluded that there was no indication that defendants were forum shopping.[51] Plaintiffs now argue that the fact that defendants' Swiss employees requested to be deposed in Spain indicates that defendants are forum shopping. However, because defendants have corporate headquarters in both Spain and Switzerland, I cannot conclude that their choice of one forum for a handful of depositions and the other for the proposed venue of this lawsuit represents improper forum shopping.

In reweighing the *Iragorri* factors, the locus of discovery counsels that the deference accorded to plaintiffs' choice of forum should be limited. I had

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50 *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d at 1336.

51 *See Optimal*, 837 F. Supp. 2d at 255.

previously distinguished the *Banco Santander* decision, based on a similar case, noting that "plaintiffs here argue that their choice of forum was based on the evidence available in New York."[52] Given that I now find that plaintiffs' argument has less force, I agree with that court's conclusion that plaintiffs' choice of forum is "entitled to some, but little, deference."[53]

B. Adequacy of Switzerland as an Alternative Forum

I previously held that Switzerland was an adequate alternative forum for this action.[54] Defendants have consented to waive any defenses in a Swiss court arising out of lack of jurisdiction or any applicable statute of limitations, and dismissal is contingent on such a waiver. Plaintiffs have not raised any argument that changes my prior decision that Switzerland provides an adequate forum.[55]

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[52] *See id.* at 256.

[53] *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d at 1336.

[54] *See Optimal*, 837 F. Supp. 2d at 256-57.

[55] I briefly note that the unavailability of the class action mechanism in Switzerland does not render it an inadequate forum. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002) (holding that joinder, where there is no class action mechanism, "is not so burdensome as to deprive the plaintiffs of an effective alternative forum"). While the lack of a class action mechanism may be relevant to the convenience analysis in the private interest factors, this carries little weight when there are no U.S. plaintiffs and the other factors weigh strongly in favor of dismissal. *See Gilstrap v. Radianz Ltd.*, 443 F. Supp. 2d 474, 488 (S.D.N.Y. 2006).

C. Private and Public Interest Factors

1. Private Interests

First, I previously held that the "relative ease of access to evidence"[56] did not weigh significantly in either direction.[57] I noted that certain factors considered by the *Erausquin* and *Banco Santander* courts weighed against the United States as a forum: all plaintiffs are foreign; and "[o]f the 121 defendants and third-parties plaintiffs believed likely to have discoverable information, thirty-five have Swiss addresses and twenty-three have addresses in other European countries, mainly Ireland. Only a handful are in New York."[58]

On the other hand, I noted that evidence concerning due diligence efforts was focused in New York. It is now clear, however, that the focus of discovery is in Europe. As will be discussed below under the third factor, a number of key witnesses are former employees of defendants and no longer subject to compulsory process to attend a trial in New York. Thus, the "relative ease of

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[56] *Maersk*, 554 F. Supp. 2d at 453-54.

[57] *See Optimal*, 837 F. Supp. 2d at 257-58.

[58] *Id.* at 257-58.

access to evidence"[59] weighs in favor of Switzerland over New York.[60]

Second, I previously held that the "cost to transport witnesses to trial"[61] is not a significant factor in the forum non conveniens analysis in this instance.[62] Nothing in defendants' renewed motion changes that conclusion.

Third, I previously held that the "availability of compulsory process for unwilling witnesses"[63] did not weigh heavily in either direction.[64] In doing so, I again relied on the importance of the witnesses located in the United States and the presence of the due diligence team in New York and New Jersey and considered

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59 *Maersk*, 554 F. Supp. 2d at 453-54.

60 On August 9, 2012, plaintiffs' counsel sent a letter to the Court attaching the August 6, 2012 Memorandum Decision and Order in *Viking Global Equities LP v. Porsche Automobil Holding SE*, Index No. 650435/11 (Sup. Ct. N.Y. Co. Aug. 6, 2012), arguing that the decision counsels in favor of weighing the New York based diligence evidence heavily and discounting the burden of applying foreign law. However, that case is easily distinguishable because (1) the court "afforded great weight" to plaintiffs' choice of forum; (2) the plaintiffs' "principal places of business [were] in New York"; and (3) the alleged misrepresentations were "purportedly made directly to plaintiffs in New York." *Id.* at 10. For these reasons, none of which exist here, the court held that "New York clearly has a vested interest" in the action. *Id.* at 12.

61 *Id.*

62 *See Optimal*, 837 F. Supp. 2d at 258.

63 *Maersk*, 554 F. Supp. 2d at 453-54.

64 *See Optimal*, 837 F. Supp. 2d at 259.

that testimony from other witnesses could be secured through letters rogatory.[65] However, it now appears that critical testimony will come from defendants' former employees, who cannot be compelled to appear at trial in New York. These witnesses include perhaps the most critical witness in this case – Manuel Echeverria, former CEO of OIS. Because of that, I now find that the "availability of compulsory process for unwilling witnesses"[66] weighs in favor of Switzerland.

Fourth, I previously found defendants' attempt to point to "other factors that make the trial more expeditious or less expensive"[67] unavailing.[68] I continue to find that defendants' arguments concerning foreign law are properly considered under the public interest factors rather than the private interest factors.

Fifth, plaintiffs argue that the advanced stage of this litigation counsels against dismissal based on forum non conveniens. Although plaintiffs are correct on this point,[69] it is not determinative in this action. Plaintiffs observe that

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65 *See id.*

66 *Maersk*, 554 F. Supp. 2d at 453-54.

67 *Id.*

68 *See Optimal*, 837 F. Supp. 2d at 259.

69 *See Lony v. E.I. DuPont de Nemours & Co.*, 935 F.2d 604, 614 (3d Cir. 1991) ("[W]henever discovery in a case has proceeded substantially so that the parties already have invested much of the time and resources they will expend before trial, the presumption against dismissal on the grounds of *forum non conveniens* greatly increases.").

extensive discovery has occurred and that this Court has expended a great deal of resources on this case, and this would normally weigh against dismissal. However, much of that effort was required because of the action's minimal connection to New York. In the course of five written opinions, thirteen of plaintiffs' eighteen claims have been dismissed. In particular, the federal securities law claims survived a motion to dismiss based on a tenuous theory, only to be dismissed later when plaintiffs conceded that the transactions did not occur in the United States. Likewise, the extensive discovery that has occurred does not counsel against dismissal because defendants have consented to permit such discovery to be used in a Swiss proceeding and dismissal is conditioned on plaintiffs' ability to use discovery already obtained in this case when the case is re-filed in Switzerland.[70] While starting the proceedings anew in Switzerland will cause some procedural delay, such delay will be minimized by the extensive discovery available from this litigation, which is likely much broader discovery than a Swiss court would permit.

Although I previously found that the private interest factors "fail to weigh heavily in either direction," I now find, based on the course of discovery, that private interests in this dispute between foreign plaintiffs and mainly foreign defendants arising from statements made abroad and based on transactions not

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[70] *See* Defendants' Reply in Support of Their Renewed Motion to Dismiss Based on *Forum non Conveniens* at 4.

governed by U.S. securities law, weigh in favor of a foreign forum; namely, Switzerland.

2. Public Interests

First, I previously found that the fora's relative interests[71] weigh slightly in favor of New York.[72] In doing so, I distinguished *Banco Santander* and *Erausquin*, which held that the United States interests had been affirmed in the criminal prosecution of Madoff, a Securities and Exchange Commission lawsuit, and numerous lawsuits filed by domestic plaintiffs alleging domestic causes of action relating to the Madoff fraud.[73] I found that New York had some interest in this case because of an "interest in federal securities fraud claims arising from New York based conduct."[74] However, plaintiffs' federal securities law claims have subsequently been dismissed.[75] In addition, the role of the New York based conduct is now less substantial. While Clark made his alleged misstatements from New York, he did so on a telephone call to Switzerland. The other alleged

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[71] *See Maersk*, 554 F. Supp. 2d at 453-54.

[72] *See Optimal*, 837 F. Supp. 2d at 259-61.

[73] *See id.*

[74] *Id.* at 260.

[75] *See In re Optimal U.S. Litig.*, — F. Supp. 2d —, No. 10 Civ. 4095, 2012 WL 1988713, at *1 (S.D.N.Y. June 4, 2012).

misstatements emanated from OIS, based in Switzerland, which has a stronger interest in policing such conduct. Indeed, a Swiss prosecutor has brought a criminal action against Echeverria arising out of the same facts at issue in this litigation.[76] Given the extensive proceedings in the United States arising out of the Madoff fraud that have affirmed its interests, and Switzerland's interest in policing conduct by its corporations and officers, I find that the fora's relative interests now weigh in favor of Switzerland. As noted in the prior opinion on forum non conveniens, the other factors concerning the fora's relative interests do not weigh heavily in either direction.[77]

Second, I previously acknowledged that the interest in "avoiding the difficulties of applying foreign law"[78] does weigh in favor of dismissal.[79] Without conclusively making a decision on applicable law, I reasoned that it was likely that foreign law would apply because none of the plaintiffs are located in the United States.[80]

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[76] *Procédure Pénale n° P/4010/2009 Franck Berlamont c/Manuel Echeverria.*

[77] *See Optimal*, 837 F. Supp. 2d at 260-61.

[78] *Maersk*, 554 F. Supp. 2d at 453-54.

[79] *See Optimal*, 837 F. Supp. 2d at 261-62.

[80] *See id.*

Plaintiffs have made no further arguments that would indicate New York law can be applied on a classwide basis. While plaintiffs make a convincing argument that the location of the tort should not be decisive,[81] their arguments do not point in the direction of New York law. Plaintiffs rely on the due diligence efforts conducted in New York to argue that New York law applies. However, this lawsuit involves claims that are conduct-regulating rules, which serve to prevent injuries from occurring.[82] Switzerland has the strongest interest in regulating the conduct of OIS, which issued the alleged misstatements.[83] Accordingly, as I previously ruled, the difficulties of applying foreign law (to adjudicate claims between foreign plaintiffs and mostly foreign defendants) weigh in favor of dismissal. While I previously found that the public interest factors weighed slightly in favor of a foreign forum, now that the federal claims are no longer present and exclusively foreign law will govern, I find that the public interest factors weigh heavily in favor of Switzerland.

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[81] *See LaSala v. TSB Bank, PLC*, 514 F. Supp. 2d 447, 465-66 (S.D.N.Y. 2007) (reasoning that situations where misconduct in one jurisdiction causes injury in another country present a scenario where the locus of the tort might not align with the jurisdiction with the greatest interest).

[82] *See Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 522 (1994).

[83] Although Clark did issue misstatements from New York, these misstatements were made in a telephone call to Switzerland.

D. Waiver

Plaintiffs argue that defendants' waived their right to raise a forum non conveniens defense.[84] This argument is misplaced. Plaintiffs' argument is based on a New York forum selection clause in an agreement between Santander Central Hispano Investment Securities ("SCHIS") and OIS. SCHIS was the predecessor to the New York-based Santander subsidiary that employed Clark and the New York analysts who conducted the Madoff diligence. In connection with those services, OIS submitted to jurisdiction in New York. However, this language does not require OIS to submit to jurisdiction in New York for claims arising from investments in Madoff's funds, by investors who were not signatories to the agreement between OIS and SCHIS. Nor is there any indication from the agreement that Optimal U.S. investors were intended third-party beneficiaries. At most, this agreement shows that OIS agreed to litigate disputes, between the Santander subsidiaries concerning diligence efforts, in New York. It does not demonstrate any waiver of defendants' right to raise a forum non conveniens defense in a dispute with Optimal U.S. investors. Nor does it bear on whether New York is the most convenient forum in which to litigate *this* dispute.

IV. CONCLUSION

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[84] *See* 7/26/12 letter from Javier Bleichmar, plaintiffs' counsel, to the Court.

For the foregoing reasons, defendants' renewed motion for dismissal on grounds of forum non conveniens is granted. Plaintiffs' motion for class certification and appointment of class representatives and class counsel is denied as moot. The Clerk of the Court is directed to close these motions [Docket No. 105][85] and this case.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
August 10, 2012

[85] Defendants' renewed motion for dismissal based on forum non conveniens was raised in defendants' 7/16/12 letter to the Court requesting a pre-motion conference, which I instructed the parties I would treat as a motion, but was not docketed as a motion.

- Appearances -

For Plaintiffs:

Edward W. Miller, Esq.
648 Franklin Avenue, 2nd Floor
Garden City, New York 11530
(516) 280-7377

Alan Ian Ellman, Esq.
Javier Bleichmar, Esq.
Labaton Sucharow, LLP
140 Broadway
New York, New York 10005
(212) 907-0877

Jack Reise, Esq.
Michael L. Greenwald, Esq.
Robbins Geller Rudman & Dowd LLP
120 E. Palmetto Park Road, Suite 500
Boca Raton, Florida 33432-4809
(561) 750-3000

For Defendants:

Gustavo J. Membiela, Esq.
Samuel A. Danon, Esq.
Hunton & Williams, LLP
1111 Brickell Avenue
Miami, Florida 33131
(305) 810-2500

Paulo Roberto Lima, Esq.
Shawn Patrick Regan, Esq.
Hunton & Williams, LLP (NYC)
200 Park Avenue, 52nd Floor
New York, New York 10166
(212) 309-1395